

1 Michael D. Braun (167416)
BRAUN LAW GROUP, P.C.
2 12400 Wilshire Blvd., Suite 920
Los Angeles, CA 90025
3 Tel: (310) 442-7755
Fax: (310) 442-7756

**Proposed Liaison Counsel for Lead Plaintiff
Movant Adrian G. Mongeli and the Class**

6 Maya Saxena
7 Joseph E. White, III
8 SAXENA WHITE P.A.
9 2424 North Federal Highway, Suite 257
Boca Raton, FL 33431
Tel: (561) 394-3399
Fax: (561) 394-3382

Lewis Kahn
Michael A. Swick
KAHN GAUTHIER SWICK, LLC
650 Poydras Street, Suite 2150
New Orleans, LA 70130
Tel: (504) 455-1400
Fax: (504) 455-1498

**Proposed Lead Counsel for Lead Plaintiff
Movant Adrian G. Mongeli and the Class**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

16 I.B.I. INVESTMENTS, LTD. Individually,
17 And On Behalf Of All Others Similarly
Situated,
18 Plaintiff,
19 vs.
20 TERAYON COMMUNICATIONS
21 SYSTEMS, INC., ZAKI RAKIB, JERRY
D. CHASE, MARK A. RICHMAN, and
EDWARD LOPEZ,
22 Defendants.
23

CASE NO.: 3-06-CV-03936 MJJ

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF ADRIAN G. MONGELI TO
BE APPOINTED LEAD PLAINTIFF
PURSUANT TO SECTION 21D(a)(3)(B)
OF THE SECURITIES EXCHANGE ACT
OF 1934 AND TO APPROVE PROPOSED
LEAD PLAINTIFF'S CHOICE OF
COUNSEL**

DATE: October 17, 2006
TIME: 9:30 a.m.
CTRM: 11, 19th Floor

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19		

FEDERAL STATUTES AND RULES

17	15 U.S.C. §78u-4(a)	<i>in passim</i>
18	Section 21D(a)(3)(B) of the Securities Exchange Act of 1934	1, 6
19	Fed.R.Civ.P. Rule 23	<i>in passim</i>
20	15 U.S.C. § 78u-4(a)(3)	<i>in passim</i>

CONGRESSIONAL REPORTS

22 House Conference Report No. 104-369, 104th Cong. 1st Sess.
at 34 (1995), reprinted at 1995 USCC&AN730, 733 1

1 **I. INTRODUCTION**

2 Adrian G. Mongeli (“Mongeli”) hereby moves to be appointed Lead Plaintiff in this action
 3 against Terayon Communication Systems, Inc. (“Terayon” or the “Company”) pursuant to Section
 4 21D(a)(3)(B) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78u-
 5 4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), and for
 6 approval of its selection of the law firms Kahn Gauthier Swick, LLC (“KGS”) and Saxena White
 7 P.A. (“SW”) as Lead Counsel, and the Braun Law Group, P.C. (“BLG”) as Liaison Counsel in this
 8 action.

9 Mongeli is precisely the type of lead plaintiff the framers of the PSLRA encouraged to
 10 participate in securities class actions by enacting the PSLRA’s lead plaintiff provision. The
 11 legislative history of the PSLRA is summarized in the Statement of Managers, which noted the
 12 PSLRA was intended to increase the likelihood that sophisticated investors who have a significant
 13 interest in the underlying action, will serve as lead plaintiffs because, among other reasons,
 14 sophisticated investors with large amounts at stake “will represent the interest of the plaintiff class
 15 more effectively than class members with small amounts at stake.” House Conference Report No.
 16 104-369, 104th Cong. 1st Sess. At 34 (1995), reprinted at 1995 USCC&AN730, 733. Mongeli is the
 17 type of sophisticated investor Congress sought to lead securities class actions through enactment of
 18 the PSLRA.¹

19 Mongeli fully understands his duties and responsibilities to the class, and is willing and able
 20 to oversee the vigorous prosecution of this action. As described in the Certification attached to the
 21 Braun Declaration at Exhibit A², Mongeli has suffered a loss of \$63,248.87 as a result of his
 22 purchase and/or acquisition of 413,079 shares of Terayon securities during the period October 28,
 23 2004 and March 1, 2006, inclusive (tentatively, the “Class Period”). To the best of his knowledge,
 24

25 ¹ If necessary, Mongeli also stands ready, willing and able to present a further detailed
 26 account of his specific attributes and abilities.

27 ² Declaration of Michael D. Braun in Support of Motion of Adrian G. Mongeli to Be
 28 Appointed Lead Plaintiff Pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934
 and to Approve Proposed Lead Plaintiff’s Choice of Counsel (“Braun Decl. at Ex. __”).

1 Mongeli has therefore sustained the largest loss of any qualified investor seeking to be appointed as
 2 Lead Plaintiff. In addition to evidencing the largest financial interest in the outcome of this
 3 litigation, Mongeli's Certification demonstrates his intent to serve as Lead Plaintiff in this litigation,
 4 including his cognizance of the duties of serving in that role.³ Moreover, Mongeli satisfies both the
 5 applicable requirements of the PSLRA and Rule 23 of the Federal Rules of Civil Procedure ("Rule
 6 23") and is presumptively the "most adequate plaintiff." Adrian Mongeli respectfully submits that
 7 he should be appointed as Lead Plaintiff in this action, and that this Honorable Court should
 8 approve his selection of the law firm of KGS and SW as Lead Counsel for the Class.

9 **II. PROCEDURAL HISTORY**

10 This case was filed on June 20, 2006, by I.B.L Investments, Ltd., individually and on behalf
 11 of all persons or entities that purchased or otherwise acquired Terayon securities during the relevant
 12 Class Period. The gravamen of the complaint is Defendants' violation of Sections 10(b) and 20(a)
 13 of the Exchange Act and SEC Rule 10b-5. Specifically, the complaint arises out of Defendants'
 14 dissemination of a series of public statements during the Class Period that contained material
 15 misrepresentations and omitted material facts concerning Terayon's financial results, business and
 16 operations. These misrepresentations and omissions caused the price of Terayon's securities during
 17 the Class Period to be artificially inflated, and thereby resulted in the damages suffered by Mongeli
 18 and the other members of the Class.

19 Shortly after the initial filing of this action, Plaintiff I.B.L Investments, Ltd. published a
 20 notice of pendency of that action in *The Financial Times*, an international business news service
 21 based in the United Kingdom. *See*, Published Notice at Exhibit B to the Braun Declaration. That
 22 notice advised class members of the existence of the lawsuit and described the claims asserted.

23

24

25 ³ The relevant federal securities laws specifically authorize any class member seeking to be
 26 appointed lead plaintiff to either file a complaint or move for appointment as lead plaintiff. *See*, 15
 27 U.S.C. § 78u-4(a)(3)(B)(iii). A copy of Mongeli's certification of its transactions in Terayon's
 28 securities during the Class Period is attached as Exhibit A to the Braun Declaration that has been
 filed in conjunction with this motion.

1 Consistent with the terms of the PSLRA, Adrian Mongeli has timely filed this motion for
 2 appointment as Lead Plaintiff within 60 days from the publication of the notice of pendency of that
 3 action in *The Financial Times*.

4 **III. SUMMARY OF FACTS**

5 Terayon Communication Systems, Inc., a Delaware Corporation headquartered in Santa
 6 Clara, California, is in the business of developing, marketing, and selling equipment to broadband
 7 service providers for delivering broadband voice, digital video solutions (“DVS”), and data services
 8 to residential and business subscribers in the United States. During the Class Period, defendant’s
 9 representations concerning the Company’s financial condition, impressive income growth, and
 10 various other statements in the Company’s quarterly and annual financial results and SEC filings
 11 were materially false and misleading because defendants knew or recklessly disregarded that the
 12 Company’s reported financial results and growth were attributable to improper accounting practices.
 13 As a result of these materially false and misleading statements, Terayon traded at artificially inflated
 14 prices during the Class Period.

15 Unbeknownst to investors, however, at all relevant times, Terayon’s internal controls and
 16 procedures and, as a result, the Company’s projections and reported financial results were seriously
 17 flawed. The Company’s lack of internal controls related to the preparation and review of financial
 18 statements and its seriously flawed accounting practices led to recordation of certain
 19 revenues in the wrong time periods. Terayon’s own independent registered accounting firm, Ernst
 20 & Young LLP, recognized the Company’s weak internal structure. The Company’s continued
 21 reckless disregard for its accounting practices and the misleading information released to
 22 shareholders presented an imminent threat to the Company’s cash flow and profitability.

23 On November 7, 2005, Terayon issued a press release titled “Terayon Announces
 24 Accounting Review and Delay in Release of Third Quarter Results.” The release acknowledged the
 25 Company’s recordation of revenues in the incorrect period, requiring a restatement of prior period
 26 financial statements. More specifically, on that day, Defendants reported that there could be “no
 27 additional assurance that Terayon or its independent auditors will not identify additional issues or
 28 other considerations in connection with the current review, and that these issues or considerations

1 will not require further adjustments to the company's prior financial results for one or more prior
 2 fiscal years or quarters. As a result of this news, on November 8, 2005, Terayon's stock price fell
 3 \$0.32 per share and closed at \$2.25, on unusually heavy trading volume of over 2.5 million shares.

4 Then, on March 1, 2006, the SEC announced that it had begun a formal inquiry of Terayon
 5 in the *Bloomberg News*. The article stated that the "Santa Clara, California-based company
 6 defaulted on its loans when it missed filing an earnings report for the quarter ended Sept. 30, 2005."
 7 These revelations shocked the market. The next day, March 2, 2006, Terayon stock plummeted
 8 \$0.37 per share, or 13.7% below the previous day's closing price of \$2.70, which was before the full
 9 extent of the Company's restatement was disclosed to investors. Terayon shares closed on March 2,
 10 2006, at \$2.25, on extremely heavy trading volume of over 4.8 million shares.

11 Defendants were motivated to and did conceal the true operational and financial condition of
 12 Terayon, and to materially misrepresent and fail to disclose the conditions that were adversely
 13 affecting the Company throughout the Class Period, because it: (1) enabled defendants to mislead
 14 investors regarding Terayon's business, operations, management and the intrinsic value of
 15 Terayon's publicly traded securities; (2) enabled defendants to publicly issue false and misleading
 16 statements and omit material adverse information about the Company; and (3) caused Plaintiff and
 17 other members of the Class to purchase Terayon securities with an unrealistically positive
 18 assessment of the Company.

19 **IV. ARGUMENT**

20 **A. The PSLRA Procedure For Lead Plaintiff Appointment Favors Appointment of
 21 Mongeli**

22 The selection of Lead Plaintiff in a securities class action is a determination made by the
 23 Court as to which plaintiff is the most capable of adequately representing the class. The Court:

24 (s)hall appoint as lead plaintiff the member or members of the purported plaintiff
 25 class that the court determines to be *most capable of adequately representing* the
 interests of class members in accordance with this subparagraph.

26 15 U.S.C. §78u-4(a)(3)(B)(i) (emphasis added). The "most adequate plaintiff" assumes a
 27 rebuttable presumption that:

1 The most adequate plaintiff in any private action arising under this subchapter is the
 2 person or group of persons that —

3 (aa) has either filed the complaint or made a motion in response to a notice under
 4 subparagraph (A)(i);
 5 (bb) *in the determination of the court, has the largest financial interest in the*
 6 *relief sought by the class; and*
 7 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
 8 Procedure.

9 15 U.S.C. §78u-4(a)(3)(B)(iii)(I) (emphasis added).

10 Only by a showing that a Lead Plaintiff will not fairly and adequately represent the class, or is
 11 subject to unique defenses that will render such plaintiff incapable of adequately representing the
 12 class, will this presumption be overcome. 15 U.S.C. §78u-4(a)(3)(B)(iii)(II).

13 Under this statutory test, Mongeli is the “most adequate plaintiff” and should be appointed
 14 as Lead Plaintiff on behalf of the proposed class. Mongeli is exactly the type of sophisticated and
 15 interested investor with large losses that Congress intended to lead class action securities lawsuits.
 16 Mongeli has timely moved this Court for appointment as Lead Plaintiff in accordance with the
 17 PSLRA and has the willingness, resources and expertise to obtain excellent results for the class.
 18 Consequently, this Court should appoint Mongeli as Lead Plaintiff and approve his selection of
 19 KGS and SW as Lead Counsel.

20 **1. Adrian Mongeli Has Complied With The PSLRA And Should Be
 21 Appointed Lead Plaintiff**

22 Mongeli moves the Court to be appointed Lead Plaintiff and has timely filed the instant
 23 motion to be appointed lead plaintiff within the 60-day time period requirement. The plaintiff in the
 24 first filed action published notice on a national business-oriented wire service, on July 11, 2006.
 25 Accordingly, Mongeli meets the requirement of 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(aa) and has filed
 26 his motion by September 11, 2006.

27 Moreover, Mongeli is a sophisticated investor who has sustained a substantial loss from his
 28 investment in Terayon stock and has shown his willingness to represent the class by signing a
 29 certification detailing his Terayon transaction information during the Class Period. *See* Braun Decl.

1 Ex. A. As demonstrated by this certification, Mongeli is prepared to consult with counsel on a
 2 regular basis, prior to every major litigation event, and direct the course of the litigation, with the
 3 benefit of counsel's advice. In addition, Mongeli has selected and retained highly competent
 4 counsel to represent the Class with significant experience in securities class action litigation. *See*
 5 Braun Decl. at Exs. C-E.

6 **2. Adrian Mongeli Has The Largest Financial Interest of The Plaintiffs
 7 Who Have Submitted Applications for Lead Plaintiff And Is Otherwise
 Qualified To Serve as Lead Plaintiff In This Action**

8 As a result of his purchases of Terayon securities throughout the Class Period The Mongeli
 9 has suffered losses of \$63,248.87. *See* Braun Decl. Ex. A. Mongeli believes he has the largest
 10 financial interest in this class action compared to any other party moving for Lead Plaintiff. The
 11 PSLRA provides that there is a rebuttable presumption that the "most adequate plaintiff" is the
 12 plaintiff with the largest financial interest in the relief sought by the class. 15 U.S.C. §78u-
 13 4(a)(3)(B)(iii)(I)(bb). "So long as the plaintiff with the largest losses satisfies the adequacy
 14 requirements, he is entitled to lead plaintiff status..." *Ferrari v. Gisch*, 225 F.R.D. 599, 602 (C.D.
 15 Cal. 2004) (*citing In re Cavanaugh*, 306 F.3d 726, 732 (9th Cir. 2002)). Mongeli, therefore, is
 16 presumptively the "most adequate plaintiff" pursuant to the PSLRA.

17 **3. Adrian Mongeli Satisfies The Requirements Of Rule 23**

18 Section 21D(a)(3)(B)(iii)(I)(cc) of the Exchange Act, as amended by the PSLRA, provides
 19 that the Lead Plaintiff must satisfy the typicality and adequacy requirements of Fed.R.Civ.P. Rule
 20 23(a). *Siegall v. Tibco Software, Inc.*, 2006 U.S. Dist. LEXIS 26780, *15 (N.D. Cal., 2006) ("In
 21 the context of determining the appropriate lead plaintiff, the requirements of 'typicality' and
 22 adequacy of representation are the key factors."). This Court's analysis of any other requirements of
 23 Rule 23 as it relates to class certification should be deferred until the Lead Plaintiff moves for class
 24 certification. *Schrive v. Impac. Mortg. Holdings, Inc.*, 2006 Dist. LEXIS 40607, *16 (C.D. Cal., S.
 25 Div. 2006) ("At the lead plaintiff appointment stage, the Rule 23 inquiry is not as searching as it
 26 would be on a motion for class certification; the prospective lead plaintiff need only make a prima
 27 facie showing that it meets the typicality and adequacy factors."). As detailed below, Mongeli
 28

1 satisfies both the typicality and adequacy requirements of Rule 23(a), and should therefore be
 2 appointed Lead Plaintiff in this action.

3 **a. Adrian Mongeli's Claims Are Typical Of The Claims Of All The
 4 Class Members**

5 Under Rule 23(a)(3), typicality exists where “the claims...of the representative parties” are
 6 “typical of the claims....of the class.” The typicality requirement of Rule 23 (a)(3) is satisfied when
 7 the representative plaintiffs' claims arise from the same event or course of conduct that gives rise to
 8 claims of other class members, and when the claims are based on the same legal theory. *See Crossen*
 9 *v. CV Therapeutics*, 2005 US Dist. LEXIS 41396, *13 (D.C. N.D. Cal., 2005). The requirement that
 10 the proposed class representatives' claims be typical of the claims of the class does not mean,
 11 however, that the claims must be identical. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th
 12 Cir. 1988).

13 In this case, the typicality requirement is met because Mongeli's claims *are* identical to the
 14 claims of the other Class Members. Adrian Mongeli and all the members of the Class purchased
 15 Terayon securities during the Class Period when the stock prices were artificially
 16 inflated as a result of the Defendants' fraudulent misrepresentations and omissions, and thus, both
 17 Mongeli and the Class Members suffered damages as a result of these purchases. Simply put,
 18 Mongeli, like all the other Class Members, (1) purchased Terayon stock during the Class Period; (2)
 19 purchased Terayon stock at artificially inflated prices as a result of the Defendants'
 20 misrepresentations and omissions; and (3) suffered damages thereby. Mongeli's claims and injuries
 21 “arise from the same event or course of conduct that [gave] rise to the claims of other class
 22 members.” *Crossen*, at *13.

23 Moreover, Mongeli is not subject to any unique or special defenses. Thus, Mongeli meets
 24 the typicality requirement of Fed.R.Civ.P. Rule 23 because his claims are the same as the claims of
 25 the other Class Members.

26 ///

27 ///

28 ///

b. **Adrian Mongeli Will Adequately Represent The Interests Of The Class**

The Requirements of Rule 23(a)(4) relating to adequate representation are satisfied “if (1) the class counsel is qualified, experienced, and generally able to conduct the litigation; (2) the interests of the class are not antagonistic to one another; and (3) the lead plaintiff has a “sufficient interest in the outcome of the case to ensure vigorous advocacy.” *Miller v. Ventro Corp.*, 2001 U.S. Dist. LEXIS 26027, *44 (N.D. Cal. 2001) (*citing Takeda v. Turbodyne Techs.*, 67 F.Supp. 2d 1129, 1132 (C.D. Cal. 1999)). As described below, Mongeli will adequately represent the interests of the class.

Mongeli's interests are clearly aligned with the members of the Class because his claims are identical to the claims of the Class. There is no evidence of antagonism between his interests and those of proposed Class Members. Furthermore, Mongeli has a significant, compelling interest in prosecuting this action to a successful conclusion based upon the very large financial loss he incurred as a result of the wrongful conduct alleged herein. This motivation, combined with Mongeli's identical interest with the members of the Class, clearly shows that Mongeli will adequately and vigorously pursue the interests of the Class. In addition, Mongeli has selected counsel that is highly experienced in prosecuting securities class actions such as this one to represent him and the class.

In sum, because of Mongeli's common interests with the Class Members, his clear motivation and ability to vigorously pursue this action, and his competent counsel, the adequacy requirement of Fed.R.Civ.P. Rule 23(a) is met in this case. Therefore, since Mongeli not only meets both the typicality and adequacy requirements of Fed.R.Civ.P. Rule 23(a), and has sustained the largest amount of losses at the hands of the Defendants, he is, in accordance with 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), presumptively the most adequate plaintiff to lead this action.⁴

⁴ The PSLRA clearly envisions a two-part test of a presumption of adequacy and a mechanism for rebutting the presumption. 15 U.S.C. §78u-4(a)(3)(B)(iii)(I) and (II). Mongeli meets the presumption of adequacy. However, there have not been any submissions to the Court which seek to rebut this presumption at this time. If any such submission can be made or is submitted to the Court, Mongeli Group would respectfully request the opportunity to address them

1 **B. This Court Should Accept Mongeli's Selection of Counsel**

2 The PSLRA vests authority in the Lead Plaintiff to select and retain counsel to represent the
 3 class, subject to the Court's approval. See U.S.C. §78u-4(a)(3)(B)(v). Thus, this Court should not
 4 disturb the Lead Plaintiff's choice of counsel unless necessary to "protect the interests of the class."
 5 15 U.S.C. §78u-4(a)(3)(B)(iii)(II)(aa).

6 Mongeli has selected KGS and SW to serve as Lead Counsel for the Class and BLG to serve
 7 as Liaison Counsel. These firms have not only prosecuted complex securities fraud actions, but
 8 have successfully prosecuted many other types of complex cases. *See* Braun Decl. Exs. C-E. This
 9 Court may be assured that in the event that this motion is granted, the members of the class will
 10 receive the highest caliber of legal representation.

11 **V. CONCLUSION**

12 For all of the foregoing reasons, Adrian Mongeli respectfully requests that this Court:
 13 (1) appoint Mongeli to serve as Lead Plaintiff in this action; (2) approve Mongeli's selection of Lead
 14 and Liaison Counsel for the Class; and (3) grant such other and further relief as the Court may deem
 15 just and proper.

16

17 Dated: September 11, 2006

Michael D. Braun
BRAUN LAW GROUP, P.C.

19 By:

/S/

20 _____
 Michael D. Braun
 12400 Wilshire Boulevard
 21 Suite 920
 22 Los Angeles, CA 90025
 Tel: (310) 442-7755
 Fax: (310) 442-7756

23 **Proposed Liaison Counsel for Lead Plaintiff**
 24 **Movant Adrian G. Mongeli and the Class**

25

26

27 with the Court in both written and oral argument.

28

1 Maya Saxena
2 Joseph E. White, III
3 SAXENA WHITE P.A.
4 2424 North Federal Highway, Suite 257
Boca Raton, FL 33431
Tel: (561) 394-3399
Fax: (561) 394-3382

5 Lewis Kahn
6 Michael A. Swick
7 KAHN GAUTHIER SWICK, LLC
8 650 Poydras Street, Suite 2150
New Orleans, LA 70130
Tel: (504) 455-1400
Fax: (504) 455-1498

9 **Proposed Lead Counsel for Lead Plaintiff Movant**
10 **Adrian G. Mongeli and the Class**

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PROOF OF SERVICE

2 STATE OF CALIFORNIA)
3 COUNTY OF LOS ANGELES)ss.:)

I am employed in the county of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is 12400 Wilshire Boulevard, Suite 920, Los Angeles, CA 90025.

On September 11, 2006, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Michael D. Braun, I filed and served the document(s) described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF
ADRIAN MONGELI TO BE APPOINTED LEAD PLAINTIFF PURSUANT TO SECTION
21D(a)(3)(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND TO APPROVE
PROPOSED LEAD PLAINTIFF'S CHOICE OF COUNSEL**

The ECF System is designed to automatically generate an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties served are as follows:

Lionel Z. Glancy, Esq. info@glancylaw.com

Attorneys for Plaintiff

15 On September 11, 2006, I served the document(s) described as:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF
ADRIAN MONGELI TO BE APPOINTED LEAD PLAINTIFF PURSUANT TO SECTION
21D(a)(3)(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND TO APPROVE
PROPOSED LEAD PLAINTIFF'S CHOICE OF COUNSEL**

by placing a true copy(ies) thereof enclosed in a sealed envelope(s) addressed as follows:

Maya Saxena, Esq.

20 Maya Sancha, Esq.
Joseph E. White, III, Esq.

SAXENA WHITE P.A.

2424 North Federal Highway, Suite 257

Boca Raton, FL 33431

22 || Tel: (561) 394-3399

Fax: (561) 394-3382

Lewis Kahn, Esq.

Michael A. Swick, Esq.

KAHN GAUTHIER SWICK, LLC

25 650 Poydras Street, Suite 2150

350 Poydras Street, Suite
New Orleans, LA 70130

Tel: (504) 455-1400

Fax: (504) 455-1498

27

Attorneys for Plaintiff

28 ||

1 I served the above document(s) as follows:

2 BY MAIL. I am familiar with the firm's practice of collection and processing correspondence
3 for mailing. Under that practice it would be deposited with U.S. postal service on that same day with
4 postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware
that on motion of the party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in an affidavit.

5 I declare declare, pursuant to Civil L.R. 23-2, that on the date hereof I served a copy of the
6 above-listed document(s) on the Securities Class Action Clearinghouse by electronic mail through the
following electronic mail address provided by the Securities Class Action Clearinghouse:

7 scac@law.stanford.edu

8 I further declare that I am employed in the office of a member of the bar of this Court at whose
direction the service was made.

9 I further declare under penalty of perjury under the laws of the United States that the above is
10 true and correct.

11 Executed on September 11, 2006, at Los Angeles, California 90025.

12
13 /S/ LEITZA MOLINAR
14 Leitza Molinar

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